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Public Duties, Private Rights: Privacy and Unsubstantiated Allegations in Washington's Public Records Act

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I. INTRODUCTION

Open government laws allow private citizens to monitor public servants. But this vital function of access presents a clash of competing interests: the privacy of public employees versus the public's right to know.[1] Washington's Public Records Act (PRA) seeks to balance these interests, and the Washington Supreme Court has fought to adhere to the PRA's spirit of open government while creating bright-line rules for the ease of government agencies.[2] The Washington Supreme Court's efforts recently led to a puzzling compromise in *Bainbridge Island Police Guild v. City of Puyallup*.[3] To protect the privacy of a police officer accused of unsubstantiated sexual misconduct, the court ordered the production of police investigative reports under the PRA, but required that the trial court "redact Officer Cain's identity."[4] The irony, of course, is that mentioning a person's name while ordering the redaction of his identity does little to protect his privacy.

The PRA provides for the disclosure of all records maintained by public agencies with the exception of certain narrowly construed exemp-

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1. *See, e.g.*, W. Alan Kailer, Note, *The Release of Private Information Under Open Records Laws*, 55 TEX. L. REV. 911 (1977); Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71 (2003).

2. *See, e.g.*, Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139 (Wash. 2008); *see also* Jeffery A. Ware, Note, Clarke v. Tri-Cities Animal Care & Control Shelter*: How Did Private Businesses Become Government "Agencies" Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741, 745–46 (2010) ("For a generation, Washington citizens have been accustomed to the right of free and open access to state and local government records.").

3. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 202 (Wash. 2011).

4. *Id.*

tions.[5] In *Bainbridge Island Police Guild*, the court considered the personal privacy and law enforcement exemptions.[6] Both exemptions protect against an invasion of privacy, which the PRA defines as the disclosure of information that would be (1) highly offensive to a reasonable person and (2) is not of legitimate concern to the public.[7] The *Bainbridge Island Police Guild* court held that investigative reports of unsubstantiated allegations of sexual misconduct against public officials are highly offensive to a reasonable person and that the public has an interest in knowing about the fact of an allegation, but not the identity of the accused.[8] This holding built on the framework of several cases, primarily *Bellevue John Does*, which applied the same rule to schoolteachers.[9] However, in *Bainbridge Island Police Guild*, the officer's name had been published in news stories[10] and was listed in the case caption,[11] resulting in the confounding order that the trial court "redact Officer Cain's identity" from the investigative reports.[12] Through its prior holdings, the court backed itself into a corner and created disagreement among the justices.[13] The opinions authored by Justice Fairhurst and Chief Justice Madsen[14] in *Bellevue John Does* and *Bainbridge Island Police Guild* illustrate the

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5. WASH. REV. CODE § 42.56.030 (2012) states as follows:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

6. *Bainbridge Island Police Guild*, 259 P.3d at 195. The personal privacy exemption is WASH. REV. CODE § 42.56.230(3) (2012). As of January 1, 2012, the legislature modified this exemption but this specific provision was unchanged. The law enforcement exemption is WASH. REV. CODE § 42.56.240(1) (2012).

7. WASH. REV. CODE § 42.56.050 (2012).

8. *Bainbridge Island Police Guild*, 259 P.3d at 198–202.

9. Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 153 (Wash. 2008); *see also* Koenig v. City of Des Moines, 142 P.3d 162 (Wash. 2006); Cowles Publ'g Co. v. State Patrol, 748 P.2d 597 (Wash. 1988).

10. Josh Farly, *Puyallup Report Finds No Crime by Bainbridge Officer During 2007 Traffic Stop*, KITSAP SUN (May 10, 2008), http://www.kitsapsun.com/news/2008/may/10/puyallup-report-finds-no-crime-by-bainbridge-in/; *see also* Amicus Curiae Brief of Allied Daily Newspapers of Washington et. al. at 9, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2) (discussing and listing the various news stories that connect Officer Cain to the allegations and are still viewable online).

11. *Bainbridge Island Police Guild*, 259 P.3d 190. The case caption actually mentions Steven Cain by name twice because the case was a consolidation of two appeals.

12. *Id.* at 202.

13. *See Koenig*, 142 P.3d at 168; *Cowles Publ'g*, 748 P.2d. at 609.

14. Through much of this Note, Chief Justice Madsen is referred to as Justice Madsen to convey the position she held at the time of the cited opinion.

primary issue dividing the court: whether any privacy interest is triggered when an allegation against a public official is deemed unsubstantiated by the public agency.[15] Consequently, the court's inability to agree and the *Bainbridge Island Police Guild* lead opinion's rule will likely result in confusion and litigation over the lines between embarrassment and privacy and between unsubstantiated and substantiated allegations. To the parties, the effect of redacting Officer Cain's identity was minimal; but the effect of expanding the right to privacy beyond personal and intimate details contradicts the legislature, sets an overly broad precedent, and entrusts public agencies with excessive discretion.

Part II of this Note lays out the events that led to Kim Koenig's allegations of misconduct against Bainbridge Island Police Officer Steven Cain and the subsequent public records requests. Part III presents the policies of the PRA and the reasoning employed in the opinions in *Bainbridge Island Police Guild* and prior cases. Part IV critiques the court's reasoning in its right to privacy jurisprudence. Part V offers a brief conclusion.

II. THE ARREST, ALLEGATIONS, AND SUBSEQUENT PUBLIC RECORDS REQUESTS

Kim Koenig and her husband John Muenster practice law together on Bainbridge Island, largely in the areas of civil rights and police abuse.[16] After midnight on September 30, 2007, a Bainbridge Island Police Officer pulled Muenster over for allegedly driving 45 miles per hour (MPH) in a 30 MPH zone.[17] The officer suspected Muenster had been drinking and asked him to exit the car; Koenig exited on the passenger side, claiming that she was Muenster's attorney.[18] The officer called for backup, and Officer Cain arrived.[19]

The parties dispute the events that followed. Koenig claims Officer Cain "dry humped" her; Officer Cain claims he hip checked her.[20] Koenig claims she had only had one drink; Officer Cain and other officers claim she smelled of alcohol and slurred her speech.[21] Koenig claims

15. *Bainbridge Island Police Guild*, 259 P.3d at 296 (Madsen, C.J., dissenting); *Bellevue John Does*, 189 P.3d at 157 (Madsen, J., dissenting). Justice Fairhurst wrote the majority in *Bellevue John Does*, while then-Justice Madsen authored a dissent. After Justice Madsen's promotion to Chief Justice, she authored another dissent in *Bainbridge Island Police Guild*, while Justice Fairhurst wrote the lead opinion.

16. THE LAW OFFICES OF MUENSTER & KOENIG, http://muensterkoenig.com/ (last visited Oct. 14, 2011).

17. Farly, *supra* note 10.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Officer Cain choked her until she defecated out of fear; Officer Cain claims he merely restrained her because she was resisting arrest.[22]

Koenig subsequently filed a complaint with the Bainbridge Island Police Department against Officer Cain, alleging sexual assault and strangulation.[23] The Bainbridge Island Police Chief had the option to keep the matter in house, but chose to ask the Puyallup Police Department to conduct a criminal investigation and the Mercer Island Police Department to conduct an internal investigation into Officer Cain's conduct.[24] Both investigations determined that there was insufficient evidence to establish that Officer Cain acted inappropriately, and the Bainbridge Island Police Department declared the allegations unsubstantiated.[25]

The incident began to draw media attention after Koenig notified the Bainbridge Island Police Department that she intended to sue the department for $400,000 in February 2008.[26] Althea Paulson of the *Bainbridge Notebook* blog covered the incident closely and initially chose not to reveal Officer Cain's identity.[27] But within days, the *Kitsap Sun* newspaper picked up the story and included Officer Cain's name.[28]

What followed was a maze of records requests and lawsuits in a series of agencies and jurisdictions. To research Koenig's claims, Paulson and Tristan Baurick of the *Kitsap Sun* requested copies of both the Mercer Island Internal Investigation Report (MIIIR) and the Puyallup Criminal Investigation Report (PCIR) from the Bainbridge Island Police Department.[29] Bainbridge Island allowed Paulson to view but not copy the PCIR[30] and told Paulson that the MIIIR would be produced absent an

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22. *Id.*

23. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 192 (Wash. 2011).

24. Brief of Respondents Bainbridge Island Police Guild & Steven Cain at 3, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2).

25. *Bainbridge Island Police Guild*, 259 P.3d at 193.

26. Althea Paulson, *City Hit With Police Misconduct Claim*, BAINBRIDGE NOTEBOOK (Feb. 4, 2008), http://bainbridgenotes.wordpress.com/2008/02/04/city-hit-with-police-misconduct-claim/.

27. Althea Paulson, *Mob Feeds on Lawyer, Local MSM Averts Its Gaze*, BAINBRIDGE NOTEBOOK (Feb. 11, 2008), http://bainbridgenotes.wordpress.com/2008/02/11/mob-feeds-on-lawyer-local-msm-averts-its-gaze/.

28. Tristan Baurick, *Bainbridge Lawyer Files Claim Against Police Department*, KITSAP SUN (Feb. 9, 2008), http://www.kitsapsun.com/news/2008/feb/09/bainbridge-lawyer-files-claim-against-police/?print=1. Paulson, of the *Bainbridge Notebook*, criticized the *Kitsap Sun* for giving a police-friendly version of the story and allowing online attacks against Koenig in its comment section. *See* Paulson, *supra* note 27.

29. *Bainbridge Island Police Guild*, 259 P.3d at 193.

30. *Id.* at 201. WASH. REV. CODE § 10.97.080 (2012) prohibits the retention and copying of nonconviction data, which is defined as "all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending." WASH. REV. CODE § 10.97.030(2) (2012). While not part of the PRA, this statute falls under the "other statutes" exemption of the PRA. *See* WASH. REV.

injunction.[31] Baurick requested a copy of the PCIR directly from the City of Puyallup.[32] Puyallup notified Officer Cain of the request,[33] and since he did not object, Puyallup gave Baurick the 117-page report.[34]

The Bainbridge Island Police Guild (BIPG) and Officer Cain then sued in Kitsap County Superior Court to prevent Bainbridge Island from releasing the reports.[35] The court found that the release of either report would violate Officer Cain's right to privacy and withheld them under the PRA's investigative report exemption.[36] However, the court did not enjoin the *Kitsap Sun* from printing an article with information from the PCIR that it had received from Puyallup because the City of Puyallup was not a party to the case.[37] In addition to the *Kitsap Sun*, other newspapers and internet sources printed articles detailing the events and identifying Officer Cain.[38] In June and July of 2008, Koenig and Bainbridge Island resident Lawrence Koss filed requests for the PCIR from Puyallup.[39] Officer Cain moved to enjoin Puyallup from producing the report in Pierce County Superior Court.[40] The court initially granted access to the report, but later found the report exempt under the PRA's personal privacy exemption and required Koenig and Koss to return the report.[41] The parties appealed directly to the Washington Supreme Court.[42]

CODE § 42.56.070(1) (2012). The Washington Supreme Court also addressed this basis for exempting production of the reports but concluded that WASH. REV. CODE § 10.97.030 only protects records arising from an arrest, detention, indictment, or other criminal charge. *Bainbridge Island Police Guild*, 259 P.3d at 201–02. Since none of these occurred, Officer Cain's identity as the alleged offender was deemed to be the only "criminal history record information" in the reports. *Id.* After reviewing the investigative files, Paulson described "a remarkable lack of observational and memory skills by the police during the traffic stop that led to Koenig's arrest. Worse, after Koenig formally complained that she was assaulted by Officer Steve Cain, the BIPD destroyed written documents detailing at least one prior, relevant complaint against him." Althea Paulson, *BI Blue Line: Protect and Serve or Shred and Forget?*, BAINBRIDGE NOTEBOOK (Mar. 11, 2008), http://bainbridgenotes.wordpress.com/2008/03/11/bi-blue-line-protect-and-serve-or-shred-and-forget/.

31. *Bainbridge Island Police Guild*, 259 P.3d at 193.

32. *Id.*

33. WASH. REV. CODE § 42.56.540 (2012) provides, "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." After receiving notification, the person to whom the record pertains may move for an injunction in the superior court. *Id.*

34. *See Bainbridge Island Police Guild*, 259 P.3d at 193.

35. *Id.*

36. *Id.* The investigative report exemption contains a privacy provision similar to the personal privacy exemption. *See* WASH. REV. CODE § 42.56.240(1) (2012).

37. *Bainbridge Island Police Guild*, 259 P.3d at 193.

38. *Id.*; *see also* Farly, *supra* note 10.

39. *Bainbridge Island Police Guild*, 259 P.3d at 193.

40. *Id.*

41. *Id.*

42. *Id.* The Washington Supreme Court hears direct appeals of cases "involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination . . . ."

Koenig, Koss, Baurick, and Paulson sent similar requests to Mercer Island for the MIIIR.[43] Officer Cain and the BIPG successfully moved for King County Superior Court to enjoin production.[44] The record requestors appealed, and the Washington Supreme Court consolidated the case with the Piece County appeal because both appeals involved the same records held by different agencies.[45]

III. THE WASHINGTON SUPREME COURT'S ATTEMPTS TO IDENTIFY AND PROTECT PRIVACY RIGHTS

A. Washington's Public Records Act

Every state has an open records law,[46] often referred to as "sunshine laws."[47] Most states have modeled their laws after the federal Freedom of Information Act (FOIA)[48] and are rooted in the idea that the government must be monitored by the people it serves.[49] Washington's PRA is a "strongly worded mandate for broad disclosure of public records."[50] The PRA creates a presumption that any record maintained or used by a government agency is open to the public.[51] Parties may overcome this presumption only if an exemption applies to the requested record.[52] Courts must interpret the exemptions narrowly.[53] Unless an agency is confident that an exemption applies, it may be reluctant to withhold a record because the PRA allows record requestors who prevail over an agency in

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WASH. R. APP. P. 4.2(a)(4); *see also* Statement of Grounds for Direct Review at 10, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2).

43. *Bainbridge Island Police Guild*, 259 P.3d at 193.

44. *Id.*

45. *Id.*

46. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002).

47. The term "sunshine laws" originates from Justice Louis Brandeis's proclamation that "sunlight is said to be the best of disinfectants." *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). Laws demanding information from public officials exist in other forms as well. *See* Joshua M. Duffy, *King Makers?: Talk Radio, the Media Exemption, and Its Impact on the Washington Political Landscape*, 33 SEATTLE U. L. REV. 191, 193 (2009) (discussing early Washington laws targeted at public disclosure of political campaign finance funds).

48. Solove, *supra* note 46, at 1161.

49. James Madison famously explained this view: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910); *see also* WASH. REV. CODE § 42.56.030 (2012).

50. Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978).

51. WASH. REV. CODE § 42.56.070 (2012).

52. *Id.*

53. WASH. REV. CODE § 42.56.030 (2012).

court to recover costs, attorney's fees, and per diem penalties.[54] Thus, the Bainbridge Island, Mercer Island, and Puyallup Police Departments wisely exercised their right under the PRA to notify Officer Cain that they planned to produce the reports.[55] While initially failing to object to Puyallup's production of the PCIR, Officer Cain eventually moved to enjoin further production of both reports.[56] As a result, the record requestors could only prevail in litigation over Officer Cain, preventing them from recovering costs, attorney's fees, or penalties by prevailing over an agency.[57]

The court in *Bainbridge Island Police Guild* applied two exemptions to the reports sought by Koenig and the other requesters: the personal information exemption and the law enforcement exemption.[58] The personal information exemption, in relevant part, exempts "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy."[59] Similarly, the law enforcement exemption protects "[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy."[60] The applicability of either exemption hinged on whether disclosure of the investigative reports would violate Officer Cain's right to privacy.[61]

Under the PRA, a person's right to privacy is violated if disclosure "(1) [w]ould be highly offensive to a reasonable person and (2) is not of legitimate concern to the public."[62] However, more significant than when a right to privacy is violated is when a right to privacy exists at all. The

54. *See* WASH. REV. CODE § 42.56.550(4) (2012); Yousoufian v. Office of Ron Sims, King Cnty. Exec., 229 P.3d 735, 747 (Wash. 2010) (adopting aggravating and mitigating factors such as whether the agency acted dishonestly for determining the appropriate penalties).

55. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 193 (Wash. 2011); *see* WASH. REV. CODE § 42.56.540.

56. *Bainbridge Island Police Guild*, 259 P.3d at 193.

57. *Id.* at 208 (Johnson, J., dissenting) (Justice Johnson notes that neither the lead nor dissenting and concurring opinions addressed attorney's fees but that attorney's fees were not awardable because the requestors did not prevail over the government agency); *see* Confederated Tribes of Chehalis Reservation v. Johnson, 958 P.2d 260, 271 (Wash. 1998) (holding that a record requestor is not entitled to costs and attorney's fees in an action brought by another party to prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order).

58. *Bainbridge Island Police Guild*, 259 P.3d at 194–95.

59. WASH. REV. CODE § 42.56.230(3) (2012).

60. WASH. REV. CODE § 42.56.240(1) (2012).

61. *Bainbridge Island Police Guild*, 259 P.3d at 200.

62. WASH. REV. CODE § 42.56.050 (2012).

term "privacy" as used in the PRA is intended to have the same definition that the Washington Supreme Court applied in *Hearst Corp. v. Hoppe*.[63] *Hearst* adopted the *Restatement (Second) of Torts*' definition of privacy, stating that its provision relating to publicity given to private life illustrates the "nature of facts that could be considered matters concerning the private life."[64] Such facts include details that one reveals only to close family and friends, like sexual relations, family quarrels, humiliating illnesses, and details of home life.[65]

Even if a court finds that an exemption applies, the PRA states that a court may enjoin production of a record only if it finds that production "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions."[66] The Washington Supreme Court has held both that this provision may prevent production even when no exemption directly applies[67] and that this provision must be satisfied even when a separate exemption does apply.[68] Therefore, "the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest."[69] Alternatively, if a privacy right identified in the PRA is at stake, the court may order an agency to redact identifying information instead of withholding the entire record.[70]

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63. Act of May 18, 1987, ch. 403, § 1, 1987 Wash. Laws 1546; *see* Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978).

64. *Hearst*, 580 P.2d at 253 (citing RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977)).

65. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977). Specifically, the comment states:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Id.

66. WASH. REV. CODE § 42.56.540 (2012).

67. Dawson v. Daly, 845 P.2d 995, 1004 (Wash. 1993).

68. Soter v. Cowles Publ'g Co., 174 P.3d 60, 82 (Wash. 2007).

69. *Id.*

70. *See* WASH. REV. CODE § 42.56.070(1) (2012).

B. The Court in Bainbridge Island Police Guild *Orders Production with Officer Cain's Name Redacted*

The court in *Bainbridge Island Police Guild* split 4–4–1.[71] The four justices in the lead opinion held that the reports must be produced with Officer Cain's name redacted, the four-justice dissent/concurrence advocated for disclosure without redaction, and Justice James Johnson dissented alone in arguing for withholding both reports in their entirety, providing the fifth vote for the redaction of Officer Cain's name.[72] Justice Fairhurst's lead opinion framed the issue of whether the personal information exemption applied as having three parts: (1) whether the reports contained personal information, (2) whether Officer Cain had a right to privacy in his identity, and (3) whether the right to privacy would be violated if the reports were released.[73]

The court quickly concluded that the reports constituted personal information, relying entirely on its recent decision in *Bellevue John Does*.[74] The court noted that *Bellevue John Does* defined personal information as "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general."[75] Based on this definition, the court in *Bellevue John Does* held that a teacher's identity in connection with an unsubstantiated allegation of sexual misconduct was personal information.[76] Thus, the court saw no reason to distinguish from *Bellevue John Does* and held that the reports were personal information.[77]

The court next considered whether production of the reports implicated Officer Cain's right to privacy.[78] The court stated that the PRA does not "explicitly identify when the right to privacy *exists*."[79] However, the court again declined to distinguish *Bellevue John Does*, where it had found that "unsubstantiated allegations are matters concerning the teachers' private lives."[80] The court then addressed the requesters' heavily briefed contention that Officer Cain had lost his right to privacy once

71. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 202 (Wash. 2011).

72. *Id.* at 202–08.

73. *Id.* at 196.

74. *Id.*

75. *Id.* (citing Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 145 (Wash. 2008)).

76. *Bellevue John Does*, 189 P.3d at 145.

77. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 196 (Wash. 2011).

78. *Id.*

79. *Id.*

80. *Id.* at 197 (citing *Bellevue John Does*, 189 P.3d at 145).

the media publicized his name.[81] The court rejected this claim for two reasons. First, the court emphasized that the PRA requires an agency to look to the contents of the requested document and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in his or her identity.[82] The court stated that even if some members of the public may know the identity of the person in the report, an agency violates the person's privacy by confirming that knowledge through its production.[83] Second, the court relied on the practical effect on the agency of considering media coverage in determining whether an individual has a right to privacy.[84] The court cited the City of Puyallup's request for a bright-line rule and noted that if media coverage eliminated the right to privacy, then agencies would be placed in the difficult position of making a fact-specific inquiry into whether coverage was significant enough to eliminate the right.[85] Thus, the court held that Officer Cain had a valid right to privacy in his identity despite widespread knowledge of his identity.[86]

Having established that a privacy right existed, the court held that production of the un-redacted reports would violate that right for three reasons.[87] First, the court held that allegations of sexual misconduct are inherently highly offensive, whether substantiated or unsubstantiated.[88] Again, the court saw no reason to depart from the holding in *Bellevue John Does*, which had reached the same conclusion in the context of sexual misconduct accusations against schoolteachers.[89] Second, the court held that the public has a legitimate interest in how a police department responds to and investigates allegations, but it does not have an interest in the identity of the accused when the allegations are unsubstantiated.[90] Finally, the court considered the PRA's separate requirements for granting an injunction to prevent disclosure of a record.[91] To enjoin production or redact, a court must find that disclosure would clearly not be in the public interest and would "substantially and irreparably damage any person, or would substantially and irreparably damage vital govern-

81. *Id.* at 197; *see* Amended Opening Brief of Appellants, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2) [hereinafter Brief of Appellants].

82. *Bainbridge Island Police Guild*, 259 P.3d at 197.

83. *Id.*

84. *Id.* at 197–98.

85. *Id.*

86. *Id.* at 198.

87. *Id.* at 199.

88. *Id.* at 198.

89. *Id.*

90. *Id.* at 199.

91. *Id.* at 200.

mental functions."[92] The court held that failing to redact Officer Cain's identity would substantially and irreparably damage him for "the same reasons that continued production of . . . Officer Cain's identity would be highly offensive."[93]

C. The Legal Foundations for the Lead Opinion

The rationale of the lead opinion in *Bainbridge Island Police Guild* primarily relied on five cases. The cases show disagreement and evolution within the court regarding what constitutes or violates a right to privacy, leading to the clash in *Bainbridge Island Police Guild*.

1. *Cowles Publishing Co. v. State Patrol*

In 1988, the Washington Supreme Court considered a case similar to *Bainbridge Island Police Guild*, except that the record requestors sought the names of law enforcement officers against whom allegations of misconduct had been sustained.[94] The court ultimately protected the information from disclosure on the basis that its nondisclosure was "essential to effective law enforcement" under the PRA's law enforcement exemption.[95] However, the court refused to protect the information under the law enforcement exemption's privacy prong because the instances of misconduct while on the job are not private, intimate, personal details of the officer's life, but involve events that occur in the course of public service.[96]

2. *Dawson v. Daly*

The Washington Supreme Court's 1993 decision in *Dawson* established that employee evaluations qualify as personal information that bears on the competence of the subject employees.[97] Thus, *Dawson* established a presumption that evaluations that do not discuss specific instances of misconduct are presumed to be highly offensive within the meaning of the PRA, despite the fact that work evaluations pertain directly to an employee's public duty.[98]

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92. WASH. REV. CODE § 42.56.540 (2012).

93. *Bainbridge Island Police Guild*, 259 P.3d at 200.

94. Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 598 (Wash. 1988).

95. *Id.* at 606. The law enforcement exemption was then codified as WASH. REV. CODE § 42.17.310(1)(d), but has since been recodified as WASH. REV. CODE § 42.56.240(1) (2012).

96. *Cowles Publ'g*, 748 P.2d at 605.

97. Dawson v. Daly, 845 P.2d 995, 1004 (Wash. 1993).

98. *Id.*

3. *Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405*

The primary foundation for the lead opinion in *Bainbridge Island Police Guild* was *Bellevue John Does*.[99] In that case, which preceded *Bainbridge Island Police Guild* by only three years, a five-justice majority opinion[100] held that schoolteachers' right to privacy is violated by production of their names in connection with unsubstantiated allegations of sexual misconduct.[101] The dispute in *Bellevue John Does* began in 2002, when *The Seattle Times* requested from the Bellevue, Seattle, and Federal Way school districts copies of all records relating to allegations of teacher sexual misconduct in the previous ten years.[102] The districts notified fifty-five schoolteachers that it would release their records, and thirty-seven of the teachers filed suit to enjoin production.[103] Perhaps as an indication of the lack of clarity in the law, the trial court, court of appeals, and the Washington Supreme Court all came to different conclusions concerning which aspects of the requested records were exempt.[104] The trial court ordered the disclosure of the identities of teachers in cases where the investigation was inadequate and when the alleged misconduct was substantiated or resulted in discipline.[105] The trial court made findings as to the adequacy of each investigation.[106]

The court of appeals reversed in part and held that unsubstantiated claims are only exempt from disclosure if an adequate investigation shows that the allegations are plainly false.[107] For example, a student accused one teacher of a violent rape, kidnapping, and performing satanic torture and human sacrifices in a cave.[108] A police investigation found no physical evidence corroborating any part of the story.[109] Thus, the court reasoned that the public had no interest in the identity of the teacher because the allegations against the teacher were patently false.[110] On the other hand, one teacher accused a fellow teacher of prolonged stroking and cuddling of his students.[111] The district hired an attorney to investigate, and the investigator found that other teachers did not notice any

99. Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139 (Wash. 2008).
100. A sixth justice concurred in the result only, leaving a three-justice dissent. *Id.* at 154.
101. *Id.* at 153.
102. *Id.* at 143.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 120 P.3d 616, 629 (Wash. Ct. App. 2005).
108. *Id*. at 626.
109. *Id.*
110. *Id.* at 627.
111. *Id.* at 625.

misconduct, but that the teacher let students sit on his lap before the principal cautioned him.[112] The district did not discipline the teacher, but the court of appeals ordered disclosure of the teacher's identity because the investigation merely found the allegations unsubstantiated; it did not find that nothing at all had happened.[113]

At the Washington Supreme Court, in a precursor to their sharp disagreement in *Bainbridge Island Police Guild*, Justice Fairhurst wrote the majority opinion in *Bellevue John Does* while then-Justice Madsen authored the dissent.[114] The Court ruled that the identity of the accused teacher may be disclosed to the public only if the misconduct was substantiated or the teacher's conduct resulted in some form of discipline.[115] The majority's analysis mirrored the same formula as in *Bainbridge Island Police Guild*, considering whether the allegations constituted personal information, whether the teachers had a right to privacy in their identities, and whether disclosure of the teachers' identities would violate their right to privacy.[116] Again, the majority noted that the PRA[117] does not define the phrase "personal information."[118] Thus, the *Bellevue John Does* court applied the dictionary definition of personal as "of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general."[119] Based on this definition, the court said that teachers' identities are "clearly 'personal information' because they relate to particular people."[120] The court next considered whether a privacy right existed and stated, as it did later in *Bainbridge Island Police Guild*, that the PRA does not "explicitly identify" when the right to privacy exists.[121] The court examined the definition of privacy from *Hearst*,[122] the holding in *Cowles Publishing* that

112. *Id.*

113. *Id.* at 628.

114. Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139 (Wash. 2008).

115. *Id.* at 143.

116. *Id.* at 145.

117. The court in *Bellevue John Does* refers to the PRA by its former name, the Public Disclosure Act (PDA). *Id* at 142. The legislature amended and recodified the PDA as the PRA in 2005, changing the statutory cite from WASH. REV. CODE § 42.17 to WASH. REV. CODE § 42.56. *Id.* However, the *Seattle Times*' request was placed before the change to the statute, which left the personal information and law enforcement exemptions unchanged in relevant part. *Id.*

118. *Id.* at 145.

119. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1686 (2002)).

120. *Id.* at 145.

121. *Id.* at 146.

122. As noted above, *Hearst* applied the RESTATEMENT (SECOND) OF TORTS (1977)'s definition of privacy, which offers sexual relations, family quarrels, humiliating illnesses, and details of home life as examples of where a privacy right exists. Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978).

no privacy right protects substantiated allegations of misconduct,[123] and the rule established in *Dawson* that the right to privacy applies to routine performance evaluations.[124] Based on these cases, the court reasoned that a privacy right protects unsubstantiated or false accusations of sexual misconduct because they are not actions taken by an employee in the course of performing public duties.[125]

Having established that a privacy right existed, the court concluded that un-redacted disclosure would violate the right because it is undisputed that allegations of sexual misconduct are highly offensive, regardless of whether or not the allegations are substantiated.[126] The court then held that unsubstantiated allegations are not a matter of legitimate matter of public concern.[127] First, the court rejected the distinction between unsubstantiated and patently false.[128] The court reasoned that the distinction was unworkable and would lead to agencies and courts making time consuming and directionless inquiries.[129] Second, the court concluded that the public has no interest in unsubstantiated allegations because "if the misconduct didn't occur, the only actual governmental action is the investigation."[130] Also, the court cited the Washington Education Association's contention that there is no legitimate public concern in the name of the accused unless there is a finding of wrongdoing and that the "alternative is too damaging to a person's career . . . without a corresponding public benefit."[131]

The court in *Bellevue John Does* also specifically considered letters of direction.[132] A letter of direction is a "letter, memorandum or oral direction which does not impose punishment, but seeks to guide or direct future performance."[133] The court relied on its holding in *Dawson* that a prosecutor's performance evaluations were personal information protected by a right to privacy to conclude the same concerning letters of direction.[134] The court then concluded that release of a letter of direction

123. *See* Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 605 (Wash. 1988).

124. *See* Dawson v. Daly, 845 P.2d 995, 1005 (Wash. 1993).

125. *Bellevue John Does*, 189 P.3d at 147–148.

126. *Id.* at 148.

127. *Id.* at 150.

128. *Id.* at 149.

129. *Id.*

130. *Id.* at 150 (citing Amicus Curiae Brief of Am. Civil Liberties Union of Washington at 6, Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139 (Wash. 2008) (No. 78603–8)).

131. *Id.* at 150 (citing Amicus Curiae Supplemental Brief of Washington Educ. Assoc. at 4, Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139 (Wash. 2008) (No. 78603–8)).

132. *Id.* at 145.

133. *Id.* at 142 n.3.

134. *Id.* at 145 (citing Dawson v. Daly, 845 P.2d 995 (Wash. 1993)).

would be highly offensive to a reasonable person if it did not identify substantiated misconduct by the teacher.[135] However, the court noted that disclosure is not highly offensive if names are redacted.[136] Additionally, the court concluded that the public has no legitimate interest in the names of the teachers who receive letters of direction when the letters do not identify substantiated allegations or impose discipline.[137] The court echoed its concern in *Dawson* that releasing the letters of direction may chill candor in the evaluation process, resulting in fewer reported allegations and an unwillingness by supervisors to memorialize communications in writing.[138]

Justice Madsen began her dissent by affirming, as she later did in *Bainbridge Island Police Guild*, that the legislature has explicitly adopted the *Restatement (Second) of Torts*' definition of the "right to privacy," as followed by the court in *Hearst*.[139] While the majority emphasized that there is no real government action other than an investigation when an allegation is unsubstantiated or false, the dissent emphasized that the allegations do not pertain to private life, but to public duties.[140] The dissent claimed that precedent supports disclosing the identities of public employees when the information concerns specific instances of misconduct occurring in the course of performance of public duties, whether or not the allegations are substantiated.[141] Importantly, the dissent noted that unsubstantiated does not mean untrue.[142] The dissent argued that placing the power in the hands of school districts to decide what is or what is not substantiated "would be the most direct course to [the PRA's] devitalization."[143] As support, the dissent noted a parade of examples of educator, school, and school district misconduct, including an incident where a Seattle educator accused of sex and drug dealing with students was promised $69,000 and silence in exchange for his resignation.[144] Because a pattern of such allegations can show the potential of abuse, the dissent claimed that the public will lack the information necessary to en-

135. *Id.* at 151–52.

136. *Id.* at 152.

137. *Id.*

138. *Id.* at 152–53 (citing *Dawson*, 845 P.2d at 1005).

139. *Id.* at 154 (Madsen, J., dissenting) (citing Hearst Corp. v. Hoppe, 580 P.2d 246 (Wash. 1978)).

140. *Id.* at 154–55 (Madsen, J., dissenting).

141. *Id.* at 156–57 (Madsen, J., dissenting).

142. *Id.* at 154 (Madsen, J., dissenting).

143. *Id.* at 159 (Madsen, J., dissenting) (citing *Hearst*, 580 P.2d at 251).

144. *Id.* at 158–59 (Madsen, J., dissenting) (citing POLICY & PROGRAM STUDIES SERV., U.S. DEP'T OF EDUC., EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE (2004)).

sure that a specific teacher does not continue to have access to children if identities are redacted, even if the rest of a report is disclosed.[145]

4. *City of Tacoma v. Tacoma News, Inc.*

The basis for the distinction between substantiated and unsubstantiated allegations lies largely in the court of appeals' 1992 decision in *City of Tacoma v. Tacoma News, Inc*.[146] In that case, the court denied access to police investigations regarding unsubstantiated allegations of child abuse against a mayoral candidate.[147] The court reasoned that a finding that allegations are "unsubstantiated" after reasonable efforts to investigate is "indicative though not always dispositive of falsity."[148] The court noted that the *Restatement* definition of privacy adopted in *Hearst* allows consideration of truth or falsity as a factor in determining whether the public has a legitimate interest in the information.[149] Thus, the court of appeals concluded that the public has no legitimate interest in the police department's investigation of unsubstantiated claims of child abuse against a mayoral candidate.[150]

5. *Koenig v. City of Des Moines*

In 2006, the court's holding in *Koenig v. City of Des Moines* set the stage for its willingness in *Bainbridge Island Police Guild* to produce redacted information, even when it is clear that the requestor of the records knows the identity of the individual whose name was redacted.[151] In *Koenig*,[152] the father of a child victim of sexual assault requested from the city and police department all records concerning the assault and subsequent investigation.[153] In accordance with an exemption specifically designed to protect victims of sexual assault, the five justices in the majority required that the city produce the reports with the name of the victim redacted.[154] However, Justice Fairhurst authored a vigorous dissent, claiming that the information must be entirely withheld because the vic-

145. *Id.* at 159 (Madsen, J., dissenting).

146. *See* Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 207 (Wash. 2011) (favorably citing *Bellevue John Doe*'s reliance on City of Tacoma v. Tacoma News, Inc., 827 P.2d 1094 (Wash. Ct. App. 1992)).

147. *Tacoma News*, 827 P.2d at 1095–96.

148. *Id.* at 1099.

149. *Id.* (citing Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978)).

150. *Id.* at 1095.

151. *Bainbridge Island Police Guild*, 259 P.3d at 198–99 (citing Koenig v. City of Des Moines, 142 P.3d 162, 163 (Wash. 2006)).

152. The plaintiff Koenig in *Koenig v. City of Des Moines* has no relation to Kim Koenig of *Bainbridge Island Police Guild*.

153. *Koenig*, 142 P.3d at 163.

154. *Id.*

tim's father had asked for the information by the name of the victim.[155] Hence, any production would affirm to the requestor that the child was a victim of sexual assault, even if the name was redacted, resulting in "fishing expedition[s]."[156] Later, however, Justice Fairhurst favorably cited the *Koenig* majority opinion while ordering that the investigative reports in *Bainbridge Island Police Guild* be produced in redacted form, despite the knowledge of the requestors and the public.[157]

IV. THE SUPREME COURT'S LOGIC FAILS TO FIT THE INTENT OR LANGUAGE OF THE PUBLIC RECORDS ACT

The Washington Supreme Court's lead opinion in *Bainbridge Island Police Guild* wrongly applied the definition of the right to privacy. The primary disagreement between the opinions in *Bainbridge Island Police Guild* is the lead opinion's view that unsubstantiated misconduct is not conduct that occurred in the course of public duties, as opposed to the dissent/concurrence's view that unsubstantiated misconduct is not an aspect of personal, private life.[158] The dissent/concurrence's characterization of the right to privacy is more true to the language and intent of the PRA.

First, Chief Justice Madsen's dissent most accurately interpreted the *Restatement (Second) of Torts*' definition of privacy—which the court adopted in *Hearst* and which the legislature affirmed.[159] In *Hearst*, the court specifically cited the *Restatement (Second) of Torts* § 652D comment b as an example of situations where the right to privacy exists.[160] The provision cites details such as sexual relations, family quarrels, humiliating illnesses, and the details of home life as examples of when the right to privacy exists.[161] The *Restatement* comment's list is comprised of things that deal specifically with intimate, personal details of one's life, not simply things that did not occur during the course of one's role as a public figure.[162] Thus, the dissent/concurrence's emphasis on the fact that Officer Cain's alleged misconduct was not part of his personal life is more true to the privacy definition adopted in *Hearst* than

155. *Id.* at 169–70 (Fairhurst, J., dissenting).

156. *Id.* at 166 (majority opinion).

157. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 198–99 (Wash. 2011) (citing *Koenig*, 142 P.3d at 164).

158. *See id.* at 204 (Madsen, C.J., dissenting).

159. *See id.*; *see also* Act of May 18, 1987, ch. 403, § 1, 1987 Wash. Laws 1546; Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

160. *Hearst*, 580 P.2d at 253.

161. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977).

162. *See id.*

the lead opinion's insistence that the unsubstantiated allegations did not pertain to Officer Cain's public duties.[163]

In adopting this view, the lead opinion in *Bainbridge Island Police Guild* and the majority in *Bellevue John Does* also ignored the distinction between embarrassment and privacy.[164] As the record requestors noted in their brief, exemptions may not be founded on vague notions of privacy or embarrassment, but must be grounded in clearly delineated statutory language.[165] The PRA expressly commands that courts consider the policy of open examination of government records when reviewing an agency action, "even though such examination may cause inconvenience or embarrassment to public officials or others."[166] Thus, because embarrassment is not a valid concern under the PRA, embarrassment cannot mean the same thing as privacy. However, neither the lead opinion in *Bainbridge Island Police Guild* nor the majority in *Bellevue John Does* mentioned the word embarrassment even once.[167] Instead, Chief Justice Madsen rightfully noted that the court expansively construed the privacy exemptions at issue "by weighing the strength of possible embarrassment and adverse reaction and ignoring the real meaning of privacy interest."[168]

Additionally, both the lead opinion in *Bainbridge Island Police Guild* and the majority in *Bellevue John Does* rely on a faulty premise. Specifically, both opinions state that the PRA does not "explicitly identify" when the right to privacy in question exists.[169] Ironically, in *Bellevue John Does*, the court immediately followed this statement by citing to the definition adopted in *Hearst*.[170] However, in *Bainbridge Island Police Guild*, the court follows the same statement by immediately referring to the definition of privacy adopted in *Bellevue John Does*.[171] The court's reliance on *Bellevue John Does* thus leads to a misapplication of the law because despite referencing the correct definition of a privacy right, the court in *Bellevue John Does* ignored that definition in its analysis.[172] As a result, the court's insistence that the legislature has not explicitly identi-

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163. *See* Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 203–04 (Madsen, C.J., dissenting).

164. *Id.* at 205 (Madsen, C.J., dissenting).

165. Brief of Appellant at 8, Bainbridge Island, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2) (citing *Hearst*, 580 P.2d at 248).

166. WASH. REV. CODE § 42.56.550(3) (2012).

167. *See Bainbridge Island Police Guild*, 259 P.3d at 192–202; Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 142–153 (Wash. 2008).

168. *Bainbridge Island Police Guild*, 259 P.3d at 205 (Madsen, C.J., dissenting).

169. *Id.* at 196–197; *Bellevue John Does*, 189 P.3d at 146.

170. *Bellevue John Does*, 189 P.3d at 146.

171. *Bainbridge Island Police Guild*, 259 P.3d at 196–97.

172. *Id.* at 205 (Madsen, C.J., dissenting).

fied when a right to privacy exists, despite the legislature's explicit adoption of the definition of the right to privacy in *Hearst*, simply becomes an excuse to expand the parameters of the right to privacy.[173]

Further, the court based its decisions in both *Bainbridge Island Police Guild* and *Bellevue John Does* on suspect precedent.[174] For instance, the court in *Bellevue John Does* relied on *Tacoma News* for the proposition that false accusations of misconduct are highly offensive and pertain to no legitimate public interest.[175] However, the child abuse alleged in *Tacoma News* was not alleged to have occurred during the course of the mayoral candidate's public duties and pertained specifically to the accused's private life.[176] Thus, in *Tacoma News*, the court had no trouble deciding that a privacy right existed and moved to the question of whether the right was violated.[177] But in *Bellevue John Does* and *Bainbridge Island Police Guild*, the court should have never reached the question of whether the privacy right was violated because unlike in *Tacoma News*, the allegations did not pertain to any aspect of the private life of the accused, but to a police officer's public duties.[178]

However, not all of the blame for the misapplication of the *Hearst* privacy definition falls on *Bainbridge Island Police Guild* and *Bellevue John Does*. Two earlier cases—*Dawson* and *Cowles Publishing*—show muddled analysis that overlooks when a privacy right exists. The court primarily veered off course fifteen years before *Bellevue John Does* in *Dawson*. Again the court cited the proper definition of a right to privacy—the "intimate details of one's personal and private life"—but failed to correctly apply it.[179] At issue were several documents from a county prosecutor's personnel file, including performance evaluations.[180] In considering the performance evaluations, the court jumped to the analysis of whether the privacy right was violated without first considering whether the performance evaluations constituted personal information or whether a privacy right even existed.[181] While purporting to analyze the offensiveness prong of whether a privacy right was violated, the court cited a federal court's statement that an individual's work performance is per-

173. *See id.* at 204 (Madsen, C.J., dissenting).

174. *See supra* Part III.C.

175. *Bellevue John Does*, 189 P.3d at 148–49.

176. City of Tacoma v. Tacoma News, Inc., 827 P.2d 1095 (Wash. Ct. App. 1992).

177. *Id.* at 1097.

178. *See Bainbridge Island Police Guild*, 259 P.3d at 196–97; *Bellevue John Does*, 189 P.3d at 146; *Tacoma News*, 827 P.2d at 1095.

179. Dawson v. Daly, 845 P.2d 995, 1003–04 (Wash. 1993).

180. *Id.* at 998–99.

181. *Id.* at 1003.

sonal information under the FOIA.[182] But the FOIA's broad privacy exemption does not expressly rely on the *Restatement (Second) of Torts*' definition of privacy and cannot provide dispositive guidance.[183] And, more importantly, this statement by the court shows that it was blending the analysis of whether the information is personal with whether the release of the information would be highly offensive. The result is that the court ignored the *Hearst* court's limitation of the right to privacy to intimate details of personal life.[184] The court properly noted that embarrassment was not grounds for exempting the performance evaluations, but held without explanation that "employee evaluations contain personal information" because the sensitivity of information relating to one's competence "goes beyond mere embarrassment," and is therefore highly offensive.[185] But the court never should have reached the question of whether disclosure of performance evaluations would be highly offensive because the information at issue was not *personal*, as required by the PRA.[186] An evaluation of one's competence in relation to performance of government work has nothing to do with personal life, but everything to do with a public employee's public duties.

The court further blended the issues in *Cowles Publishing*.[187] There, the court properly noted that instances of misconduct during a police officer's work do not fall under the definition of "personal privacy," but the court relied on the fact that the information was not of a personal nature to claim that disclosure would not be highly offensive.[188] However, like in *Dawson*, the court should have never reached the question of whether disclosure would be highly offensive.[189] Further, it is inaccurate to claim that disclosure of instances of misconduct during work performance would not be highly offensive to a reasonable person. In fact, as previously mentioned, the court held in *Bainbridge Island Police Guild* that even substantiated allegations of sexual misconduct in the workplace are highly offensive.[190] Instead, whether misconduct pertained to a public employee's work speaks to the requirement that the public have a legitimate interest, not to whether release of the information would be highly

182. *Id.* (citing Celmins v. United States Dep't of Treasury, 457 F. Supp. 13, 15 (D.D.C. 1977)).

183. *See* 5 U.S.C. § 552(b)(6) (2012). The FOIA also has only nine exemptions, leaving much to judicial interpretation as opposed to specific legislative determinations. *See id.*

184. *See Dawson*, 845 P.2d at 1003.

185. *Id.* at 1004 (citing Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979)).

186. WASH. REV. CODE § 42.56.230(3) (2012); *see* Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 204 (2011) (Madsen, C.J., dissenting).

187. *See* Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 605 (Wash. 1988).

188. *Id.*

189. *See Bainbridge Island Police Guild*, 259 P.3d at 204 (Madsen, C.J., dissenting).

190. *Id.* at 198 (lead opinion).

offensive. Thus, in *Cowles Publishing*, the court failed to separate the issues and left blurred exactly which issues it had decided.[191]

A. The Effect of Expanding the Right to Privacy

The immediate effect of redacting Officer Cain's name in *Bainbridge Island Police Guild* was not substantial. The requestors and the public were already aware of Officer Cain's identity in connection with the allegations.[192] While the court's sweeping rule that the public never has an interest in the name of the subjects of unsubstantiated allegations of misconduct[193] cannot always be correct,[194] the public's primary interest is in how the agency responds to allegations of misconduct.[195] The production of the redacted reports in *Bainbridge Island Police Guild* served this interest,[196] which led access-to-government advocates to regard the case as a practical victory.[197] But the effects of the court's inability to agree and its expansion of the right to privacy will be lasting.

One effect of the court's misapplication of the definition of the right to privacy is that agencies can manipulate PRA exemptions relating to privacy.[198] The court has stated that granting the power of interpreting the PRA to the very agencies that the PRA is meant to supervise "would be the most direct course to its devitalization."[199] Justice Madsen makes this point clear in her dissent in *Bellevue John Does*.[200] There, then-Justice Madsen noted that schools have been known to promise secrecy

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191. *See Cowles Publ'g*, 748 P.2d at 605.

192. *Bainbridge Island Police Guild*, 259 P.3d at 193.

193. *See* Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 150 (Wash. 2008). The rule for schoolteachers in *Bellevue John Does* has since been applied simply: "Unsubstantiated allegations are exempt from disclosure." Morgan v. City of Fed. Way, 213 P.3d 596, 601 (Wash. 2009).

194. *See Bellevue John Does*, 189 P.3d at 159 (Madsen, J., dissenting) (noting that "[t]here is . . . much to be said for the Court of Appeals' concern, which I share, that multiple allegations of sexual misconduct can create a troubling pattern").

195. *See Bellevue John Does*, 189 P.3d at 149–50.

196. *Bainbridge Island Police Guild*, 259 P.3d at 198.

197. Tristan Baurick, *State Supreme Court Rules for Disclosure of Bainbridge Police Misconduct Records*, KITSAP SUN (Aug. 18, 2011), http://www.kitsapsun.com/news/2011/aug/18/state-supreme-court-rules-for-disclosure-of/. (note that the reporter, Tristan Baurick, was a party to the case seeking access to the reports); *see also* Christine Beckett, *Wash. High Court Rules Internal Investigations Partially Open*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Aug. 22, 2011), http://www.rcfp.org/newsitems/index.php?i=11996&fmt=print&PHPSESSID=2fd48ee1d068eb01c251a10279b996ca.

198. *See Bellevue John Does*, 189 P.3d at 159 (Madsen, J., dissenting); *see also* Julia E. Markley, *The Fox Guarding the Henhouse:* Newman v. King County *and Washington's Freedom of Information Law*, 73 WASH. L. REV. 1107 (1998) (arguing that a Washington Supreme Court case creating a categorical exemption for open police files would empower the police with an easy method of avoiding public records requests by keeping an investigation open).

199. Hearst Corp. v. Hoppe, 580 P.2d 246, 251 (Wash. 1978).

200. *See Bellevue John Does*, 189 P.3d at 158–59 (Madsen, J., dissenting).

in exchange for resignations, allowing unnamed predatory teachers to move from school to school.[201] This example illustrates both the significance of redacting the name of the teachers and the reason why courts cannot trust agencies to interpret the PRA.[202]

Moreover, the courts' rulings vest too much trust in government agencies by deferring to the agencies' determination of what is or is not substantiated. Admittedly, the investigative reports in *Bainbridge Island Police Guild* did not suffer from this problem because the Bainbridge Island Police Department asked the Mercer Island Police Department to conduct an internal investigation and the Puyallup Police Department to conduct a criminal investigation.[203] One could make the case that the relationship between police departments renders even these investigations suspect; or, one might note that the Bainbridge Island Police Department itself ultimately applied the label of "unsubstantiated" to the reports.[204] However, outsourcing the investigations greatly increased their credibility and reduced concerns that the finding of unsubstantiated was unfounded. But that was not the case in *Bellevue John Does*, where the schools often conducted their own investigations.[205] Further, the Bainbridge Island police chief had the option of keeping the investigation in house, which would have raised deeper concerns.[206] Thus, *Bainbridge Island Police Guild* set a potentially dangerous precedent of deferring to agencies and created an incentive for agencies to deem an allegation unsubstantiated.

Another effect of expanding the right to privacy to include details that are not personal and intimate is that the court may use the privacy components of the personal information and law enforcement exemptions as a fall back to prevent disclosure of highly embarrassing information that pertains to a public employee's work. The PRA is clear that courts must construe exemptions narrowly with the policy of open government in mind.[207] Moreover, the legislature has expressly stated that it intended privacy as used in the PRA to refer to the type of personal and intimate details laid out in the *Restatement (Second) of Torts*.[208] Thus, the

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201. *Id.* at 158.

202. *See id.*

203. *See* Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 192–93 (Wash. 2011).

204. *Id.* at 193.

205. *See* John Does 1–11 v. Bellevue Sch. Dist. No. 405, 120 P.3d 616, 621–22 (Wash. Ct. App. 2005).

206. Brief of Respondents Bainbridge Island Police Guild & Steven Cain at 3, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2).

207. *See* WASH. REV. CODE § 42.56.030 (2012); WASH. REV. CODE § 42.56.550(3) (2012).

208. Act of May 18, 1987, ch. 403, § 1, 1987 Wash. Laws 1546; *see* Hearst Corp. v. Hoppe, 580 P.2d, 246 249 (Wash. 1978).

insistence of the courts in *Bainbridge Island Police Guild* and *Bellevue John Does* that the legislature has not explicitly identified when a right to privacy exists is disturbing because it represents a sharp departure from the court's supposed commitment to interpret PRA exemptions narrowly.[209]

This willingness to depart from the plain language of the PRA is also evident in the court's quest to create a bright-line rule. The PRA makes clear that courts must interpret the PRA according to the policy of open government "even though such examination may cause *inconvenience* or embarrassment to public officials or others."[210] Thus, as desirable and beneficial as a bright-line rule may be, it is not the court's place to prioritize the convenience of a bright-line rule over the PRA's policy of disclosure.[211]

It may very well be sound policy to redact the names of public employees who are the subjects of unsubstantiated allegations of misconduct and to prevent disclosure of routine performance evaluations.[212] However, because the right to privacy refers only to personal and intimate details that do not pertain to one's public employment, the personal information and law enforcement exemptions are twisted and expanded when used by courts to accomplish such means.

B. How the Court Should Analyze the Personal Information and Law Enforcement Exemptions

The court's right-to-privacy jurisprudence reflects the difficulty in weighing the competing interests at stake. As the law stands, public officials have too much discretion but still face uncertainty, citizens do not know what they have the right to know, and lower courts must follow incoherent guidance. The court should step back and reframe its right-to-privacy analysis.

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209. *See Bainbridge Island Police Guild*, 259 P.3d at 196–97; Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 146 (Wash. 2008).

210. WASH. REV. CODE § 42.56.550(3) (2011) (emphasis added).

211. *See Bellevue John Does*, 189 P.3d at 160 (Madsen, J., dissenting) ("I am troubled by the majority's attraction to the rule that the identities of teachers who are subjects of unsubstantiated allegations should remain undisclosed because it is an easy rule to apply. I do not believe that the majority's conclusion conforms to the requirement that exemptions to the disclosure mandate of the PRA should be narrowly construed.").

212. Perhaps the best argument in favor of redaction in these situations is that the public interest is ultimately harmed by preventing the efficient operation of government and chilling candor in the evaluation process. *See* Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 598–610 (Wash. 1988).

1. The Right to Privacy

Washington courts should apply the right to privacy in the PRA only to personal and intimate details that have nothing to do with one's public job performance and let the legislature fill in the gaps. Thus, the court should abandon the proposition that the PRA does not "explicitly identify"[213] when the right to privacy exists and, instead, narrowly construe the definition of privacy applied in *Hearst*,[214] as required by the PRA.[215]

An appropriate first step toward this more accurate application of the law would be for the court to collapse its analysis of whether information is personal and whether a privacy right exists. The personal information exemption states that personal information is exempt "to the extent that it would violate a right to privacy."[216] This statutory construction implies that agencies may disclose some personal information without violating one's right to privacy. However, the right to privacy referenced in the law enforcement exemption contains no personal information prong, but courts still consider the exemption to protect the same right.[217] Additionally, the *Hearst* definition of privacy adopted by the legislature protects only information that is personal.[218] Thus, some personal information may not be protected by the right to privacy, but the right to privacy incorporates only personal information. As a result, separating the analysis of whether information is personal and whether information fits the *Hearst* definition of the right to privacy is superfluous. The court should begin by applying the *Hearst* definition of privacy, which requires that the information be personal.

2. The Unsubstantiated Versus Substantiated Distinction

Even if the court continues its broad interpretation of the right to privacy, the court should abandon its categorical distinction between unsubstantiated and substantiated allegations. Instead, the court should consider whether the allegations were false or unsubstantiated as merely one factor along with others, such as the quality of the investigation. The court of appeals in *Bellevue John Does* drew a distinction between unsubstantiated allegations and those that are patently false.[219] The court's

213. *See Bainbridge Island Police Guild*, 259 P.3d at 196–97.

214. *See* Hearst Corp. v. Hoppe, 580 P.2d 246, 253 (Wash. 1978).

215. WASH. REV. CODE § 42.56.030 (2012).

216. WASH. REV. CODE § 42.56.230(3) (2012).

217. *See Bainbridge Island Police Guild*, 259 P.3d at 195.

218. *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977).

219. John Does 1–11 v. Bellevue Sch. Dist. No. 405, 120 P.3d 616, 627 (Wash. Ct. App. 2005).

reasoning was that the public may have an interest in unsubstantiated claims because they relate to at least some on-the-job conduct of a public employee, while the subjects of patently false allegations are of no interest to the public.[220] As a consideration of the public's interest, this approach is more logically sound than the distinction between unsubstantiated and substantiated because government conduct may be significant even if an allegation is unsubstantiated.[221]

For example, in *Bainbridge Island Police Guild*, Officer Cain admitted to forcefully arresting Ms. Koenig and hip checking her against a police vehicle.[222] Even though independent investigations did not find sufficient evidence of the alleged sexual misconduct, the arrest constitutes conduct with which the public has a legitimate concern.[223] While scenarios like this make the rule adopted by the court of appeals in *Bellevue John Does* tempting, the Washington Supreme Court correctly pointed out that such a distinction is impractical because the line between unsubstantiated and patently false is blurry.[224] However, the distinction between substantiated and unsubstantiated may be just as blurry. What if the investigations in *Bainbridge Island Police Guild* had determined that Officer Cain committed punishable misconduct during the course of the arrest, but not the sexual conduct and strangulation alleged by Ms. Koenig? Or what if the investigation concluded that Officer Cain had strangled, but not "dry humped," Ms. Koenig? In such a case, Ms. Koenig's specific allegations would be unsubstantiated, but Officer Cain would have committed misconduct, creating a valid public interest in his identity.

Both distinctions are impractical, and both are unnecessary if the court properly applies the definition of right to privacy, which would prevent any allegation regarding a public employee's duties from being considered private. But if the court continues its misapplication of the definition of a right to privacy, the court should avoid the impractical categorical rule against disclosure of unsubstantiated allegations and, instead, follow the more reasonable rule of the court of appeals in *Taco-*

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220. *Id.*

221. *See* Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 189 P.3d 139, 154 (Wash. 2008) (Madsen, J., dissenting).

222. Farly, *supra* note 10.

223. *See* Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 205 (Wash. 2011) (Madsen, C.J., dissenting).

224. *See Bellevue John Does*, 189 P.3d at 149. The court also noted that such a distinction would place an unreasonable burden on agencies to make difficult individualized inquires. *Id.* But the relevance of this concern is debatable in light of the PRA's proclamation that convenience is not a significant reason to ignore the policy of the PRA; *see also* WASH. REV. CODE § 42.56.550(3) (2012).

ma News.[225] *Tacoma News* held that a finding of unsubstantiated or false is merely a factor in determining the public's interest.[226] This approach comports with the intent of the PRA to promote openness despite inconvenience.[227] Further, weighing factors such as whether the allegation was substantiated and the quality of the investigation will minimize the perverse incentive for agencies to find an allegation unsubstantiated and grant public access in cases where other factors establish a legitimate public interest.[228]

3. The Injunction Requirements

Finally, the court should follow its precedent by treating the injunction provision of the PRA as a separate ground for refusing to withhold information. The Washington Supreme Court has held that "the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest."[229] In *Bainbridge Island Police Guild*, the court held that production of the reports with Officer Cain's identity un-redacted would substantially and irreparably damage him "[f]or the same reasons that continued production of the portions of the PCIR and MIIIR containing Officer Cain's identity would be highly offensive."[230] The court's reason for holding that producing the un-redacted reports would be highly offensive was that *Bellevue John Does* had already established that any allegation of sexual misconduct is highly offensive.[231] Backtracking even further, the court's reasoning in *Bellevue John Does* was that it is "undisputed" that disclosure of the identities of the teachers would be highly offensive.[232] Thus, the court's reasons for why the production of Officer Cain's name would be both highly offensive and irreparably damaging are elusive.

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225. *See* City of Tacoma v. Tacoma News, Inc., 827 P.2d 1095, 1099 (Wash. Ct. App. 1992).

226. *Id.*

227. *See* WASH. REV. CODE § 42.56.550(3) (2012).

228. *See Bellevue John Does*, 189 P.3d at 151. The majority in *Bellevue John Does* rejected consideration of the quality of the investigation because such a rule presumes that teachers are more likely to be guilty of misconduct simply because of an allegation. *Id.* The dissent, however, aptly pointed out that this naïve approach "leaves school districts free to control whether an accused teacher's identity must be released by controlling the scope and depth of its investigation." *Id.* at 157–58 (Madsen, J., dissenting).

229. Soter v. Cowles Publ'g Co., 174 P.3d 60, 82 (Wash. 2007) (italics in original).

230. Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 200 (Wash. 2011).

231. *Id.* at 198 (citing *Bellevue John Does*, 189 P.3d at 148 n.18).

232. *Bellevue John Does*, 189 P.3d at 148. The court's only support for this proposition was parenthetical references to *Dawson* and *Tacoma News* for the notion that unsubstantiated allegations of misconduct are highly offensive. *Id.* However, the court then noted, without citation, that sexual allegations are highly offensive whether substantiated or unsubstantiated. *Id.*

While the general proposition that allegations of sexual misconduct are highly offensive to a reasonable person is indeed difficult to dispute, this assertion provides no support for the separate consideration that production of Officer Cain's identity would substantially and irreparably damage him. One reporter briefly obtained an un-redacted copy of the PCIR, and news stories had already linked Officer Cain to the allegations.[233] Additionally, after the Washington Supreme Court's ruling, the media published many more articles linking Officer Cain to the allegations.[234] Officer Cain's public exposure would not have been intensified if the reports were produced un-redacted. Any damage to Officer Cain's reputation had either already occurred or was bound to occur after providing redacted reports to requestors who already knew Officer Cain was the subject of the reports.[235] Thus, the plurality stuck to its commitment to create a bright-line rule against the production of unsubstantiated claims, even though its rule was inapplicable to the facts at hand. The troubling result is that the court ignored its precedent and blended the requirements of the privacy right exemptions and the PRA's injunction requirements, rendering the injunction requirements meaningless.[236]

V. CONCLUSION

While the court's logic in *Bainbridge Island Police Guild* is suspect, the ruling preserves the ability of the public to supervise how the government reacts to claims of misconduct by public officers. Additionally, the ruling had no disparate impact on the right of the public or the accuser to find out why the allegations were deemed unsubstantiated. However, the court should reform its jurisprudence interpreting the right to privacy back to the approach adopted in *Hearst* and affirmed by the legislature. There are many instances where the disclosure of unsubstantiated allegations against police officers or routine performance evaluations may do more public harm than good, as well as cause the subjects of such records extreme embarrassment. But the Washington Supreme Court's use of the right to privacy in the personal information and law enforcement exemptions of the PRA as a vessel for protecting these interests has expanded the exemptions. Unchecked expansion of the PRA's exemptions not only contradicts the word and spirit of the PRA, but also

233. *Bainbridge Island Police Guild*, 259 P.3d at 193.

234. *See, e.g.*, Baurick, *supra* note 197.

235. *See* Brief of Appellants at 10, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190 (Wash. 2011) (No. 82374–0 & No. 82803–2).

236. *See* Soter v. Cowles Publ'g Co., 174 P.3d 60, 82 (Wash. 2007) (reasoning that "if we assume that the additional findings contemplated by [WASH. REV. CODE §] 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous").

threatens the right of Washington's citizens to supervise their government.